IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29/03/2004

CORAM

THE HON'BLE MR.JUTICE M. CHOCKALINGAM

SECOND APPEAL NO.1258 OF 1993

1. Abdul Hameed (died)
2. Shaheeda Beevi
3. Mohamed Aariff
4. Mohamed Yousuf
5. Fathahunnisa
6. Tajudeen
7. Rowlathunnisa
8. Anwar Sadath
9. Rasinna Fathima
(The appellants 2 to 9 are impleaded as
appellants LRs of the deceased first
appellant vide CMP.3082/97
dt.24.1.98) .. Appellants

-Vs-

Arulmigu Somanathaswamy Devasthanam
rep by its Executive Officer
Nidur,
Nagai Kai-de-Millet District .. Respondent

This second appeal is preferred under Section 100 of CPC against the judgment and decree dated 31.3.1993 made in AS No.66 of 1987 on the file of the learned Subordinate Judge, Mayiladuthurai confirming the judgment and decree dated 31.7.87 made in OS No.810 of 1974 on the file of the learned District Munsif, Sirkali.

!For Appellants : Mr.Srinath Sridevan

^For Respondent : Mr.B.Kumar

:JUDGMENT

This second appeal has been brought forth by the first defendant in a suit for permanent injunction, whose defence plea was rejected by both the courts below.
2. The following facts are noticed in the pleadings of the parties.
The immovable property more fully described in the schedule to the plaint belonged to the plaintiff Devasthanam. It is a punja land measuring

11-2/3 cents. The second defendant, pursuant to the lease chit dated 11.1.1941 in favour of the temple, was put in possession. The total extent of the lease was 95 kulis. Pagathy was fixed at Rs.6/- per annum. While so, by mistake, the Authorised Officer granted Kudiyiruppu patta to an extent of 20 cents to Viswanathan and Arunachalam, the sons of the second defendant. The previous Executive Officer of the temple has not taken any action for the grant of patta. No action was initiated to set aside the grant of patta and the same is pending. The present suit was only in respect of 11-2/3 cents, which is shown as C in the plan attached to the plaint. All the three plots, namely A, B and C, totally measuring 95 kulis are comprised in S.No.220/1. Taking advantage of the patta granted in favour of the second defendant's sons for an extent of 60 kulis, they have conveyed the same to the first defendant. The said portions are shown as A and B. The plot C, which was originally in the occupation of the second defendant was also assigned to the first defendant without the permission of the temple. The second defendant had no manner of right to transfer his leasehold to the first defendant. The first defendant is only a trespasser and is in possession of the entire block. The second defendant left the suit place and is residing in Kaduvangudy. The suit property, which was marked as C in the plan, is surrounded by plots A and B, which are in the occupation of the first defendant. They are situated on south and West. On the north is the big wall of the temple and the West is the property of Abdul Kadar. The old thatched house put up by the second defendant has fallen long back. The entire block is now vacant. Since the first defendant was making arrangements to put up pacca house in the portions marked as A and B and has excavated the earth and bricks were stored up around the plot, the plaintiff has filed the suit for permanent injunction against the first defendant restraining him from making any construction in A and B .

3. The suit was resisted by the first defendant stating that the patta granted in favour of the sons of the second defendant are valid; that they were originally tenants of the plaintiff in respect of the sites for which pattas were subsequently issued; that they were entitled to the benefit of Act 40/71; that the plaintiff, knowing fully well that they were eligible to claim the benefit of Act 40/71, consented for the grant of patta being issued and also received the compensation amount due to the temple; that now, the plaintiff cannot question the same; that the first defendant has purchased for good and valuable consideration the entire 95 kulis on 25.8.1974 by means of a registered sale deed from Pakkirisamy and his sons, and thus, he has become the owner exclusively for 95 kulis and he has been in possession all along; that the plaintiff cannot have any claim for 11-2/3 cents also; that it is not correct to state that 11-2/3 cents was vacant; that the first defendant has also put up construction over the property comprised in S.Nos.220/1B and 1C also; that the plaintiff cannot seek any right of ingress or egress in S.Nos.220/1B and 1C; that the right of the plaintiff over the suit property has become extinguished by operation of Act 40/71; that no right of way could exist or available to the plaintiff over S.No.220/1B and 1C; that the plaintiff is not entitled to recover the possession of property marked as A from the defendant and has no title to the same also, and hence, the suit was to be dismissed.

4. The trial court framed necessary issues, tried the suit and decreed the same. Aggrieved, the first defendant took it on appeal, which was also dismissed. Hence, this second appeal has been brought forth by the first

defendant aggrieved over the judgment of courts below.
5. At the time of admission, the following substantial questions of law were formulated by this Court for consideration:

1) When a tenant forfeits his right of tenancy by breach of express conditions in the lease which gives the landlord a right of re-entry, then whether the tenant is not entitled to a notice of forfeiture of tenancy before being evicted?
2) Whether a dominant owner can claim an easement of necessity over only a particular portion of the servient owner's land and not by any other route on the ground that the other route would be inconvenient?
3) Whether the servient owner does not have the right to dictate the dominant owner as to where the right of way is to be created?
4) Whether a dominant owner can claim an easement of necessity over a vast extent of the servient owner's land when it would be far easier for him and for the servient owner to make an apperture in a wall adjacent to the dominant owner's land and create a pathway thereby?
5) Whether vesting of land in a Kudiyiruppu under the Tamil Nadu Act 40/71 does not extinguish all rights of other in the property so vested?

6. Heard the learned counsel for the appellants and the learned counsel for the respondent.
7. The plaintiff temple Sri Somanathaswamy Devasthanam, Nidur has filed a suit seeking permanent injunction simplicitor restraining the first defendant from in any way putting up any construction in such a way to obstruct the plaintiff's right to have ingress and egress through the portions A and B. Admittedly, the suit property, which is shown as C in the plan with an extent of 11-2/3 cents belonged to the temple and along with this property, an extent of 95 kulis were originally leased out to the second defendant in the year 1941. It is not in controversy that originally the survey number pertaining to the property was 189 and subsequently, it was assigned in S.No.220/1. According to the plaintiff, the Authorised Officer, Kudiyiruppu, by mistake has granted patta to an extent of 20 cents to the sons of the second defendant and proceedings have already been initiated to cancel the same. The second defendant, admittedly, who is in possession of the property, in question, has put forth the defence plea stating that the portions shown as A and B were conveyed to him by a proper sale deed and the rest shown as C was also assigned by the second defendant and his sons. At this juncture, it has to be pointed out that there was no material placed by the defence to show that for such a transfer, any consent or prior permission was obtained from the temple and needless to say that such a transfer is invalid.
8. From the available evidence, it is clear that on 20.10.1974, a communication was addressed to the temple stating that the lease agreement could be obtained from the first defendant and the same could also be sold to him. Now, it would be clear from the materials that the first defendant, who has been contesting the suit, was the trespasser in respect of the property, in question. From the communication dated 20.10.1974, as referred to above under Ex.A.3, the second defendant surrendered the possession to the first defendant pursuant to the lease inter se between them. Under the stated circumstances, it would be futile on the part of the first defendant to claim any benefit under Act 40/71.

9. An Advocate Commissioner was appointed by the trial court and on inspection, he has filed his report and plan, which are marked as Exs.C.1 and C.2. A perusal of Ex.C.2 would clearly indicate that a lane is available on the East of B schedule property and that could be used as passage to have ingress and egress to C schedule. Taking into consideration of the same, the trial court has granted permanent injunction in respect of B schedule only and in appreciation of the evidence available, the first appellate court has affirmed the judgment of the trial court. This Court is unable to notice any reason why the concurrent finding of both the courts below has got to be disturbed.

10. In the result, this second appeal is dismissed, leaving the parties to bear their costs.

Index : Yes
Internet : Yes

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To
1. The Subordinate Judge, Mayiladuthurai
2. The District Munsif, Sirkali
3. The Record Keeper, VR Section,
High Court, Madras